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TRENDS IN EUROPEAN CONFLICTS LAW

Friedrich K. Juenger†

A comment on foreign choice-of-law developments seems appropriate in an issue of the *Cornell Law Review* dedicated to an eminent teacher of conflicts and comparative law. During the last decade or so American conflicts scholarship retreated somewhat from a formerly outward-looking tradition to focus, more narrowly, on the discussion of domestic cases and issues. But recent Supreme Court decisions¹ as well as endeavors on the diplomatic level² may once again encourage more broadly gauged approaches. Also, some of the conflicts issues that have spawned so much discussion in American legal journals are threatened by extinction. Repeal, judicial disfavor, and the advent of no-fault plans may be expected to spell the eventual demise of guest statutes³ and ceilings on wrongful death recovery⁴—the simple grist of so many complex conflicts mills. Thus, impending obsolescence⁵ adds pertinence to the admonition that “we have every reason to try to bring to an end our parochialism in Private International Law.”⁶

While American scholarship has been largely preoccupied with

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¹ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

² See R. SCHLESINGER, *COMPARATIVE LAW* 30 (3d ed. 1970); Carl, *Conflicts of Law: An Appeal for Revival of its Multinational Character*, 26 J. LEGAL ED. 495 (1974); Kearney, *The United States and International Cooperation to Unify Private Law*, 5 CORNELL INT'L L.J. 1 (1972); Nadelmann, *Conflicts between Regional and International Work on Unification of Rules of Choice of Law*, 15 HARV. INT'L L.J. 213 (1974).

³ The California Supreme Court was the first to hold the local guest statute unconstitutional. See *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973). Since that decision, three other highest state courts have followed suit. See *Henry v. Bauder*, 213 Kan. 751, 518 P.2d 362 (1974); *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974); *Thompson v. Hagan*, 96 Idaho 19, 523 P.2d 1365 (1974).

⁴ Only four states have retained statutory limits on wrongful death recovery. See COLO. REV. STAT. ANN. §§ 13-21-201, -203 (1973); KAN. STAT. ANN. § 60-1903 (Supp. 1974); N.H. REV. STAT. ANN. § 556:13 (1974); W. VA. CODE ANN. § 55-7-6 (Cum. Supp. 1974). In all of these states, legislative action has raised the ceiling in recent years from the once common level of \$15,000, which the New York Court of Appeals once called an “absurdity and injustice.” *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 40, 172 N.E.2d 526, 528, 211 N.Y.S.2d 133, 136 (1961).

⁵ The choice-of-law experts continue to engage in transcendental meditation over guest-statutes . . . while the state no-fault legislators are bulldozing away progressive conflicts innovations

Kozyris, *No-Fault Insurance and the Conflict of Laws—An Interim Update*, 1973 DUKE L.J. 1009, 1033.

⁶ Cavers, Book Review, 85 HARV. L. REV. 1499, 1502 (1972); see also Carl, *supra* note 2, at 495-96.

matters of "inner-national" concern, European observers have followed developments in this country with considerable interest. I shall attempt to fathom their reaction to the "conflicts revolution" and to speculate on similarities and differences between American and European conflicts trends.

I

FOREIGN REACTION TO THE "CONFLICTS REVOLUTION"

A. *The Literature*

In the same year that the New York Court of Appeals indelibly linked the late Mr. Jackson's name with that of Miss Babcock,⁷ two foreign authors introduced modern American theories to European audiences. Dr. Heini of Zurich addressed the Swiss Association of International Law on *Recent Currents in American Private International Law*,⁸ while Professor De Nova of the University of Pavia lectured in Spain on *The United States Concepts of Conflict of Laws from the Point of View of a Continental*.⁹ One year later Professor Kegel of the University of Cologne taught a course entitled *The Crisis of Conflict of Laws*¹⁰ at the Hague Academy of International Law. His presentation, which was devoted primarily to a description and critique of Currie's governmental interest analysis and Ehrenzweig's *lex fori*-basic rule approach, was followed by others in which Belgian, English, Greek, Italian and, of course, American scholars commented on the American conflicts scene.¹¹

Outside the Hague as well, the "American School" has attracted increasing attention. A number of articles, book reviews,¹²

⁷ Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

⁸ Heini, *Neuere Strömungen im amerikanischen internationalen Privatrecht*, XIX SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT 31 (1962).

⁹ De Nova, *Le concezioni statunitensi dei conflitti dei leggi viste da un continentale*, in CUADERNOS DE LA CÁTEDRA "DR. JAMES BROWN SCOTT" (Universidad de Valladolid 1964).

¹⁰ 1964-II RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 91 [hereinafter cited as RECUEIL DES COURS].

¹¹ See references in Cavers, *supra* note 6, at 1500 n.11.

¹² See references cited *id.* at 1500 n.10; Carbone, "*Lex Fori approach*" e applicazione della legge straniera, 24-1 DIRITTO INTERNAZIONALE 283 (1970); Siehr, *Ehrenzweigs lex-fori-Theorie und ihre Bedeutung für das amerikanische und deutsche Kollisionsrecht*, 34 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 585 (1970); Vischer, *Das neue Restatement "Conflict of Laws"*, 38 RABELSZ 128 (1974); d'Oliveira, Book Review, 19 NEDERØ LANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 70 (1972); Foyer, Book Review, 21 REVUE INTERNATIONALE DE DROIT COMPARÉ 650 (1969); Giuliano, Book Review, 4 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 490 (1968); Mija de la Muela, Book Review, 21 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 118 (1968); van Hecke, Book Review, 62 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 403 (1973); Verplaetse, Book Review, 57 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 824 (1968); von Overbeck, Book Review, 87-1 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 130 (1968); Wengler, Book Review, 170 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 464 (1970).

and at least four monographs¹³ dealing specifically with American developments have appeared abroad. Some of the standard foreign conflicts treatises discuss the trends that have surfaced in this country.¹⁴ As Professor Cavers put it, "[i]n Europe a stream of works of appreciation and deprecation has begun to flow."¹⁵

B. *A Split of Opinion*

Foreign reaction to our experience has indeed been mixed. While established academicians tend to be skeptical, there is a "pro-American" faction composed primarily of younger authors with varying degrees of exposure to American legal thinking.¹⁶ They are not uncritical, but their attitude is one of openness to new approaches, one which welcomes experimentation.

It may be too early to assess the relative strengths of these factions. Although most of the major European texts still adhere to jurisdiction-selecting methods,¹⁷ even traditionalist stalwarts occasionally admit to a certain grudging admiration¹⁸ for the *mos Americanus*.¹⁹ Some of those who question the soundness of American theories tend to write in a defensive vein,²⁰ which might suggest that they view the prospects for a reorientation in Europe as a distinct possibility. In any event, it seems fair to say that the mechanistic nineteenth century doctrine which still pervades Euro-

¹³ F. DE AZEVEDO, RECHERCHES SUR LA JUSTIFICATION DE L'APPLICATION DU DROIT ÉTRANGER CHEZ LES ANGLO-AMÉRICAINS ET LEURS ANTÉCÉDENTS HOLLANDAIS (1971); C. JOERGES, ZUM FUNKTIONSWANDEL DES KOLLISIONSRECHTS (1971); A. SHAPIRA, THE INTEREST APPROACH TO CHOICE OF LAW (1970); V. TRUTMANN, DAS INTERNATIONALE PRIVATRECHT DER DELIKTSOBLIGATIONEN (1973).

¹⁴ See, e.g., I H. BATIFFOL & P. LAGARDE, DROIT INTERNATIONAL PRIVÉ 315-16, 346-47 (5th ed. 1971); G. KEGEL, INTERNATIONALES PRIVATRECHT 81-83 (3d ed. 1971); I E. VITTA, DIRITTO INTERNAZIONALE PRIVATO 183-96 (1972).

¹⁵ Cavers, *supra* note 6, at 1500.

¹⁶ *Id.*

¹⁷ A Canadian reviewer of five standard German treatises and commentaries, all published in the early seventies, concludes:

Contemporary German doctrine, as represented by these works, remains unwaveringly attached to certain basic principles. All of the authors who expressly deal with the question agree, in familiar language, that private international law is that body of rules which indicate the legal system whose law is to be applied in the given case.

Glenn, Book Review, 18 McGill L.J. 624, 628-29 (1972).

¹⁸ See, e.g., Kegel, in RECUEIL DES COURS, *supra* note 10, at 207, 263; Lalive, *Remarks*, 90-2 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 404, 405-06 (1971).

¹⁹ A term used by Baade to connote American legal reasoning in general. See Baade, Book Review, 22 AM. J. COMP. L. 784 (1974). It is employed herein to serve as yet another label for what has been called the "American school" (see Cavers, *supra* note 6, at 1501), in full realization that neither may "withstand close scrutiny." *Id.*

²⁰ See, e.g., Lalive, *supra* note 18; Neuhaus, *Empfiehl sich eine Kodifizierung des internationalen Privatrechts?*, 37 RABELSZ 453, 455-56 (1973).

pean conflicts thinking is losing ground; a confrontation between traditionalists and innovators is brewing.

The considerations which motivate Europeans to embrace American ideas range from the political²¹ to the practical.²² While foreign protagonists share with American critics of the first *Restatement*²³ a disenchantment with conceptualism and insensitive rules, it is difficult to say which particular brand of the *mos Americanus* is preferred. Some foreign writers favor Currie,²⁴ others are intrigued by Ehrenzweig's teachings.²⁵ In part at least, their concern is with results; several authors find the teleological component of American departures particularly appealing.²⁶ Three years ago Professor Zweigert, director of the prestigious Max Planck Institute for Foreign and Comparative Law in Hamburg, delivered a lecture at the University of Colorado in which he deplored the failure of traditional conflicts rules to take into account social policies and values.²⁷ He argued for giving a broader sway to the *lex fori* and, in the absence of settled conflicts rules, the application of the better rule of law.²⁸

II

PRACTICAL SIGNIFICANCE

Whatever the majority opinion or the preferences of particular writers may be, "revolutionary" ideas have drifted to the Old World. But will they have any practical impact? A number of European authors are doubtful. Some view developments in the United States as simply an American aberration,²⁹ as a fad,³⁰ or as

²¹ See C. JOERGES, *supra* note 13; cf. Rehinder, *Zur Politisierung des internationalen Privatrechts*, 28 JURISTENZEITUNG 151 (1973).

²² See, e.g., Gutzwiller, *Von Ziel und Methode des internationalen Privatrechts*, XXV SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT 161 (1968); Siehr, *Wechselwirkungen zwischen Kollisionsrecht und Sachrecht*, 37 RABELSZ 466 (1973).

²³ RESTATEMENT OF CONFLICT OF LAWS (1934).

²⁴ See, e.g., C. JOERGES, *supra* note 13; A. SHAPIRA, *supra* note 13.

²⁵ See, e.g., Carbone, *supra* note 12; Siehr, *supra* note 12. On the Continent, unlike in England (see Morris, Book Review, 21 AM. J. COMP. L. 322 (1973)), no champions of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) have emerged.

²⁶ See, e.g., Gutzwiller, *supra* note 22; Siehr, *supra* note 22.

²⁷ Zweigert, *Some Reflections on the Sociological Dimensions of Private International Law or What is Justice in Conflict of Laws?*, 44 U. COLO. L. REV. 283 (1973). A German version of this article has been published under the title *Zur Armut des internationalen Privatrechts an sozialen Werten* in 37 RABELSZ 435 (1973).

²⁸ Zweigert, *supra* note 27, at 294-95, 299.

²⁹ See, e.g., Kegel in F. JUENGER, *ZUM WANDEL DES INTERNATIONALEN PRIVATRECHTS* 35, 39-44 (1974); Mann, Book Review, 93-1 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 224, 225 (1974).

³⁰ Mann, *supra* note 29, at 224.

"un-European."³¹ On a more sophisticated level, it has been argued that American methodologies are not exportable because only a shared common-law heritage and a substantial degree of homogeneity among state laws make such diffuse approaches tolerable.³²

The difference in legal traditions clearly has some relevance to the reception of American ideas in Europe. At a minimum, it inhibits direct transplantation via court decisions. Unlike the House of Lords in *Chaplin v. Boys*,³³ a civil law tribunal can hardly be expected to engage in a lengthy analysis of *Babcock v. Jackson*.³⁴ Still, it does not seem altogether impossible that notions quite similar to those that prevail on this side of the Atlantic will make themselves felt in European practice.

A. *The Influence of Legal Writers*

In the United States the conflicts revolution was promoted by scholarly pronouncements. The importance attributed by judges to academic writings is even greater in foreign countries, and doctrinal changes can exert a powerful influence on the courts.³⁵ Since academicians often serve as draftsmen or advisers, their views may also affect legislation and treaty making.³⁶

The role of theoreticians is particularly entrenched in countries like Germany, where institutes of foreign and comparative law are asked, by courts and counsel, to render opinions not only on

³¹ See, e.g., Brogгинi, *Remarks*, 90-2 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 391, 392 (1971); Lalive, *supra* note 18, at 407; cf. Carl, *supra* note 2, at 496. A Swiss author attributes some of these flippancies to "indolence" or "European insolence" (without suggesting that these two characteristics are mutually exclusive). Heini, *Privat- oder "Gemein"-Interessen im internationalen Privatrecht?*, 92-1 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 381 (1973).

³² H. DÖLLE, INTERNATIONALES PRIVATRECHT 39 (2d ed. 1972); Evrigenis, *Tendances doctrinales actuelles en droit international privé*, 1966-II RECUEIL DES COURS 313, 385-89; Lipstein, *The General Principles of Private International Law*, 1972-I RECUEIL DES COURS 97, 163, 226; cf. Heini, *supra* note 8, at 60-61; Siehr, *supra* note 12, at 587-93.

³³ [1969] 3 W.L.R. 322.

³⁴ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

³⁵ Savigny's ideas inspired a judicial re-interpretation of "nonconforming" statutes. See G. KEGEL, INTERNATIONALES PRIVATRECHT 76 (3d ed. 1971). In both France and Germany doctrinal considerations prompted the courts to convert unilateral statutory conflicts rules into universal ones. A. EHRENZWEIG, CONFLICT OF LAWS 312 (1962).

³⁶ It is noteworthy that four years ago when the Swiss Bar Association debated the advisability of codifying Swiss conflicts law both Rapporteurs commented on the *mos Americanus*, as did several participants in the subsequent discussion. See Vischer, *Das Problem der Kodifikation des schweizerischen internationalen Privatrechts*, 90-1 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 1, 16-23, 26, 32, 44-47 (1971); Broggin, *La codification du droit international privé en Suisse*, *id.* at 241, 276-88, 309, 313, 320; and the comments, *id.* at 391-439, *passim*.

questions of foreign law but also on conflicts issues.³⁷ Thus, given the personal prestige of Professor Zweigert and the authoritative quality which the opinions submitted by his institute enjoy,³⁸ his views could portend a major reorientation of German conflicts law.

B. Trends in European Case Law

Another way in which "American"³⁹ conflicts ideas could make themselves felt abroad is through a process of spontaneous generation or independent discovery.⁴⁰ Left to their own devices, foreign courts might develop approaches similar to those elaborated in the United States. Indeed, there is some evidence that this can hap-

³⁷ See R. SCHLESINGER, *supra* note 2, at 319-20; Riegert, *The Max Planck Association's Institutes for Research and Advanced Training in Foreign Law*, 25 J. LEGAL ED. 312, 316 (1973); Zweigert, *supra* note 27, at 297.

³⁸ Zweigert, *supra* note 27, at 297-98.

³⁹ European critics not only question the merits but also the originality of the *mos Americanus*. Thus, it has been said that

these "novel" American theories seem to amount, in essence, to a recent rehash of very ancient, and indeed "reactionary," theories that the European science of private international law considers to have left behind a long time ago.

Lalive, *supra* note 18, at 407. For similar criticism, see, e.g., Lipstein, *supra* note 32, at 143-58; Rheinstein, *How to Review a Festschrift*, 11 AM. J. COMP. L. 632, 633, 660 (1962).

Even "pro-American" authors have noted a resemblance between Brainerd Currie's approach and that of the statutists. See, e.g., C. JOERGES, *supra* note 13, at 151-52, 162, 169; Vischer, *Remarks*, 90-2 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 397, 403 (1971). Indeed, Currie seems to concede this affinity. While he professed to be "proud to associate myself with the common-law tradition" and argued for a "return to methods indigenous to our legal system," (B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 627 (1963)), he traced his central idea to Lord Kames, a Scottish judge. See *id.* at 188, 379, 612. Scotland was civil-law oriented and Henry Home, Lord Kames, had studied the Digests, as well as the work of the Dutch commentators. See I. ROSS, *LORD KAMES AND THE SCOTLAND OF HIS DAY* 20-25 (1972); Anton, *The Introduction into English Practice of Continental Theories of the Conflict of Laws*, 5 INT'L & COMP. L.Q. 534, 535 (1956). As a judge, Lord Kames is said to have favored Roman law (I. ROSS, *supra*, at 216); as an author, he maintained that "foreign matters must be governed by the rules of common justice . . . or *jure gentium*." 2 H. KAMES, *PRINCIPLES OF EQUITY* 314 (3d ed. 1778). In any event, Currie, apparently misled by the civilian term "prescription," erroneously attributed a much broader meaning to the passage he cites than is warranted by its wording and context. (The word refers to statutes of limitations, rather than statutes generally (see *id.* at 402).)

⁴⁰ Even if it is true that the American approaches lack novelty (see note 39 *supra*), it seems that they were engendered by such a process, rather than by emulation.

Ideas resembling those that have gained acceptance in the United States, but apparently not borrowed from here, can be found in contemporary European legal literature. See, e.g., R. QUADRI, *LEZIONI DI DIRITTO INTERNAZIONALE PRIVATO* 279-95 (5th ed. 1969); Eek, *Peremptory Norms and Private International Law*, 1973-III RECUEIL DES COURS 1; Francescakis, *Lois d'application immédiate et règles de conflit*, 3 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 691 (1967); Gothot, *Le renouveau de la tendance unilatériste en droit international privé*, 60 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 1, 209, 415 (1971); Stöcker, *Aussenprivatrechtliche Grundlagenprobleme und inländischer Enteignungsschutz für Minderheitsaktionäre, deren Gesellschaftsanteile durch ausländische Staaten konfisziert werden*, [1965] WERTPAPIER-MITTEILUNGEN 442.

pen. Professor Vischer of the University of Basel maintains that the practice of the Federal Court of Switzerland

accords to an unexpected degree with the assertion of many authors in the United States that the interest of a legal system in having its law applied should be a primary consideration in each case, that conflicts decisions should be made on the basis of the policies and interest of the concerned jurisdictions There is no indication of a direct influence of the American teachings, they are possibly unknown to the Federal Court. Rather, the Federal Court follows a "natural" tendency to assure its own law a large sphere of application.⁴¹

The author argues that the result-selective ingredient which he attributes to the American theories⁴² is also discernible in Swiss case law.⁴³ As an example, he mentions the decision in *Cardo v. Cardo*.⁴⁴ In that case, the Federal Court granted a divorce to a French woman who, by virtue of her marriage to an Italian citizen, had also acquired his nationality. It had previously been held that aliens could be divorced in Switzerland only if the divorce would be recognized in the home countries of both parties.⁴⁵ According to *Cardo* it is sufficient that the divorce will be recognized in a country of which the plaintiff is a national, *i.e.*, in either Italy or France. This liberalized practice favors forum law and policy⁴⁶ and, in effect, divorceability.⁴⁷

Apparently inspired by considerations similar to those which

⁴¹ Vischer, *supra* note 36, at 19; *see also id.* at 26.

⁴² *Id.* at 20.

⁴³ *Id.*

⁴⁴ 94(2) Arrêts du Tribunal Fédéral Suisse, Recueil Officiel [R.O.] 65 (IIe Cour Civile 1968).

⁴⁵ *See* 93(2) Entscheidungen des Schweizerischen Bundesgerichtes, Amtliche Sammlung [BGE] 354 (1967); 59(2) BGE 113 (1933).

⁴⁶ Except for the required findings that the marriage is divorceable and that the divorce will be recognized according to the national law of either party, Swiss courts, like their American counterparts, apply forum law. *See* F. VISCHER, INTERNATIONALES PRIVATRECHT 596-97 (1969).

⁴⁷ The court in *Cardo* said:

Even though the judge cannot rely on considerations concerning the desirable law, he must nevertheless strive to apply the law in a manner which conforms as much as possible to current circumstances and mentality. To that end, he will often be induced to abandon a traditional interpretation which was no doubt justified when the law was laid down, but which can no longer be sustained by reason of a change of circumstances or the evolution of ideas.

. . . [B]oth in Switzerland and in the majority of neighboring countries . . . parties . . . avail themselves in large numbers of the possibility of dissolving their marriage by means of a divorce. . . .

The Swiss judge has no reason to give preference to foreign law which ignores this institution.

94(2) R.O. at 71, 73. *See also* 2 A. EHRENZWEIG & E. JAYME, PRIVATE INTERNATIONAL LAW 175 (1973) ("favor divortii").

motivated the Swiss court to alter its prior holding,⁴⁸ the French courts have gone even further. Even though the Code Civil ordains the nationality principle,⁴⁹ they tend to apply the *lex fori* in divorce cases involving aliens. Thus, it has been held that French law applies if either spouse is a French citizen.⁵⁰ It also governs the divorce of aliens having different nationalities but a common French domicile.⁵¹ If the spouses live in different countries, the courts apply French law *qua* forum law.⁵² Even the divorce of aliens having a common nationality is controlled by the *lex fori* if neither party invokes the foreign law.⁵³

C. *Parallels to American Case Law*

The "homeward" or "stay-at-home trend"⁵⁴ outlined above is not limited to France or Switzerland, nor is it restricted to divorces.⁵⁵ The nationality principle, a key feature of the traditional continental European conflicts systems, seems to be losing ground.⁵⁶ In view of the singular importance of nationality as a connecting factor,⁵⁷ its demise may prove to be no less unsettling than the overthrow of *lex loci* in this country.⁵⁸

⁴⁸ See 2 A. EHRENZWEIG & E. JAYME, *supra* note 47, at 175.

⁴⁹ Code Civile [C. Civ.] art. 3(3) (73e ed. Petits Codes Dalloz 1973-74).

⁵⁰ Ferrari v. Ferrari, [1923] Recueil Sirey [S. Jur.] I. 5, [1922] Recueil Périodique et Critique [D.P.] I. 137 (Cass. civ.).

⁵¹ C. v. C., [1961] Journal du droit international (Clunet) 734, [1961] S. Jur. I. 262, [1961] La Semaine Juridique [J.C.P.] IV. 50 (Cass. civ. Ire); Lewandowski v. Lewandowski, [1955] S. Jur. I. 540, [1955] J.C.P. II. 8771 (Cass. civ. Ire); but cf. Rivière v. Roumantzeff, [1953] Clunet 860, [1953] S. Jur. I. 181, [1953] J.C.P. II. 7863 (Cass. civ. Ire).

⁵² T. v. W., [1961] Clunet 734, [1961] S. Jur. I. 263, [1961] J.C.P. IV. 98 (Cass. civ. Ire).

⁵³ Bisbal v. Bisbal, [1960] S. Jur. I. 610, [1960] J.C.P. II. 11733 (Cass. civ. Ire).

⁵⁴ See 1 A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW 104 (1967).

⁵⁵ See, e.g., Kropholler, *Vom Staatsangehörigkeits- zum Aufenthaltsprinzip*, 27 JURISTENZEITUNG 16 (1972); Makarov, *Kollisionsnormen in den sowjetischen "Grundlagen" des Ehe- und Familienrechts*, in 1 IUS PRIVATUM GENTIUM (FESTSCHRIFT FÜR RHEINSTEIN) 363 (1969); Verheul, *Divorce in Netherlands Private International Law*, 19 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 311 (1972); see generally 2 A. EHRENZWEIG & E. JAYME, *supra* note 47, at 140-43.

⁵⁶ See, e.g., H. NEUHAUS, DIE GRUNDBEGRIFFE DES INTERNATIONALEN PRIVATRECHTS 145-47 (1962); L. PALSSON, MARRIAGE AND DIVORCE IN COMPARATIVE CONFLICT OF LAWS 41-43 (1974); 1 E. RABEL, THE CONFLICT OF LAWS 171 (2d ed. 1958); Batiffol, *Une évolution possible de la conception du statut personnel dans l'Europe continentale*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 295 (1961); Kropholler, *supra* note 55. See generally de Winter, *Nationality or Domicile?*, 1969-III RECUEIL DES COURS 347.

⁵⁷ See H. NEUHAUS, *supra* note 56, at 139 (nationality principle as the "gold standard" of private international law).

In European practice, the "personal law" covers a far broader range of matters than those which, in Anglo-American jurisdictions, are controlled by the law of the domicile. See 1 E. RABEL, *supra* note 56, at 110-13.

⁵⁸ The nationality principle, first advocated during the last century, has become entrenched in numerous codes and treaties. See 1 E. RABEL, *supra* note 56, at 121-23. The void left by its abolition might serve to encourage judicial and legislative experimentation.

While a number of European authors argue that nationality should simply be replaced with some form of domiciliary nexus,⁵⁹ the courts apparently prefer to resort to forum law.⁶⁰ Their aversion to customary conflicts rules may be inspired by considerations not entirely dissimilar from those which prompted American judges to opt for modern approaches that are responsive to forum law and substantive policies. However, European courts tend not to articulate their motivations as freely as do American judges.⁶¹ Frequently, even the doctrinal underpinnings supporting judicial decisions are difficult to divine.⁶² For this reason, a decision of the German Constitutional Court,⁶³ which may be more important for what it said than for what it held, merits comment.

III

THE *García* DECISION OF THE GERMAN CONSTITUTIONAL COURT

This is not the place to retell the story of José and Hilde García, who, instead of celebrating their nuptials north of the border in a Danish Gretna Green, induced the German Constitutional Court to change the rule that would have barred the Spaniard from marrying his divorced German bride.⁶⁴ It suffices to

⁵⁹ See, e.g., de Winter, *supra* note 56; H. NEUHAUS, *supra* note 56, at 161-66.

⁶⁰ See notes 46-55 and accompanying text *supra*. The connecting factors of domicile or habitual residence favor application of forum law because people tend to sue where they live. They also promote common-sense results since they are flexible and can be manipulated by litigants and courts.

⁶¹ See generally J. DAWSON, *THE ORACLES OF THE LAW* 374-83, 402-03, 406-16, 494-95, 505 (1968) (German and French judicial opinions); J. WETTER, *THE STYLE OF APPELLATE JUDICIAL OPINIONS* (1960).

⁶² Concerning the opinion-writing technique of the French Cour de Cassation, an American author has said that

the one-sentence format of the court's opinions, with its wearisome repetition of whereas clauses, is severely constricting. . . . More basic is the extremely cryptic and laconic style with which the court expresses both facts and law. Propositions of law are drafted with utmost care and precision but they hang suspended in space, for no effort is made to reconcile them with very different propositions in other, nearly related cases or to explain why they would not apply if the facts of the case were somewhat different.

J. DAWSON, *supra* note 61, at 414. But cf. Nadelmann, *Marginal Remarks on the New Trends in American Conflicts Law*, 28 LAW & CONTEMP. PROB. 860, 862-64 (1963).

Even the rather more informative style of German opinion writing has recently attracted criticism. See KÖTZ, *Über den Stil höchstrichterlicher Entscheidungen*, 37 RABELSZ 245 (1973); Siehr, *Vom Lesen und Schreiben kollisionsrechtlicher Entscheidungen*, 38 RABELSZ 631 (1974).

⁶³ Judgment of May 4, 1971, 31 BVerfG 58.

⁶⁴ See Juenger, *The German Constitutional Court and the Conflict of Laws*, 20 AM. J. COMP. L. 290 (1972).

say that the case has all the familiar characteristics of American landmark decisions: the facts are simple, the occasion is commonplace, the result should be obvious, and its ramifications are horrendous. A headnote captures the thrust of the opinion:

The provisions of German private international law as well as the application of the foreign law they invoke in specific cases are subject to the constitutional protection of fundamental rights.⁶⁵

A. *Constitutional Control and Jurisdiction-Selecting Rules*

The implications of the above statement are twofold. First, the requirement that choice-of-law provisions must comply with constitutional precepts casts doubt on the continued validity of a substantial segment of the German statutory conflicts rules. To the extent that they, for example, discriminate between the sexes, these rules may have to be replaced with decisional law.⁶⁶

Even more important is the court's second mandate, that conflicts decisions must produce constitutional results. Like the first *Restatement*, traditional German doctrine postulates neutral jurisdiction-selecting rules intended to promote predictability and uniformity of result.⁶⁷ Rules of this kind pay no regard to the content and policies of conflicting laws or the outcome of lawsuits; they are clearly not designed to guarantee dispositions that conform to constitutional standards. Indeed, the idea that conflicts rules (other than the public policy reservation) should be held accountable for the consequences they produce is an anathema to those who, steeped in traditional thinking, believe in "conflicts justice."⁶⁸

B. *Scholarly Reaction*

It is hardly surprising that the decision of the German Constitutional Court has evoked a vigorous and partly acrimonious response.⁶⁹ A number of scholars may feel that a consideration of

⁶⁵ 31 BVerfG at 58.

⁶⁶ Juenger, *supra* note 64, at 296-97.

⁶⁷ See Glenn, *supra* note 17, at 629-30; von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347, 349, 352, 354 (1974).

⁶⁸ Glenn, *supra* note 17, at 630.

⁶⁹ The *García* decision has probably attracted more attention than any other case in the history of German conflicts law. A special issue of a prestigious conflicts and comparative law journal was devoted to a symposium on the decision. See 36 RABELSZ 1 (1972). According to one author, the case "has not only changed prior practice but signifies a spectacular defeat for the German school of private international law." Stöcker, *Der internationale ordre public im Familien- und Familienerbrecht*, 38 RABELSZ 79, 81 (1974). See also Neuhaus, *Bundesverfassungsgericht und Internationales Privatrecht, Versuch einer Bilanz*, 36 RABELSZ 127 (1972).

substantive policies and values would defile the pristine purity of conflicts law and could endanger peaceful coexistence.⁷⁰ They must find it perturbing that the court belittled the lofty ideal of uniformity of result by observing that this basic ingredient of conflicts justice is "largely unrealized."⁷¹ The highest tribunal, with obvious disdain for orthodoxy, said that

as a glance at foreign conflicts rules and the efforts to reform German private international law show, there are a number of possibilities each of which, in one respect or another, may have its advantages from the point of view of justice and expediency.⁷²

Whatever else one might read into this remark, it seems quite clear that the court no longer believes in "first principles of legal thinking."⁷³ Furthermore, certain affinities of the court's reasoning with American conflicts ideas may, to some European jurists, seem no less unsettling than this judicial relativism.

C. *Parallels to American Conflicts Thinking*

The *García* opinion does not prescribe any particular conflicts methodology. Rather, it leaves to the ordinary courts the development of approaches that will avoid unconstitutional results in multinational cases. In fact, the court specifically authorized recourse to such familiar ploys as characterization, the preliminary question, and public policy.⁷⁴ However, its own analysis is at odds with the conventional conflicts mechanism from which these devices are derived. The opinion speaks in terms of "rebuffing the intrusion" of "Spanish public policy" which, because of the case's

⁷⁰ Representative of the attitude to which the text alludes is the following statement found in a standard German commentary:

The task of private international law is to create some incipient order against the backdrop of diverse legal systems, an order which, above all, must be premised on finding for each transaction the ideal connecting factor, the one best suited for the transaction. That is, the connecting factor which refers to the law with which the transaction has the closest spatial, personal and real relationship [I]f . . . a transaction is rooted in foreign law, that law must apply; it would be inappropriate to differentiate according to the content of the law thus invoked, to apply agreeable law and, in the case of disagreeable law, to select different connecting factors which permit one to circumvent the application thereof. Such an approach is precluded by the deference owing to other nations; the domestic judge may not elevate himself to the position of judging the morals of the world

F. Gamillscheg, in J. v. STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN, part 3, Introduction to art. 13, No. 55, at 43-44 (10th & 11th eds. 1973).; See also Glenn, *supra* note 17, at 629-30; Neuhaus, *Neue Wege im europäischen internationalen Privatrecht?*, 35 RABELSZ 401, 412-13 (1971).

⁷¹ 31 BVerfG at 83.

⁷² *Id.* at 73-74.

⁷³ *Mutual Life Ins. Co. v. Liebong*, 259 U.S. 209, 214 (1922) (Holmes, J.).

⁷⁴ See 31 BVerfG at 63-64, 86.

factual contacts with the Federal Republic, "cannot be tolerated from the point of view of the German legal order."⁷⁵ This passage has a familiar ring. It suggests that the court perceived the matter as a clash of governmental policies⁷⁶ rather than, in the traditional vein, as a mere conflict of rules.

The considerations that relate to the territorial scope of German constitutional law again reveal a pronounced similarity to American conflicts ideas. Addressing itself to the circumstances under which the forum constitution can claim application in multinational cases, the court said:

[I]t must be determined in each case, through construction of the particular constitutional provision, whether, according to its wording, spirit and purpose, it claims application to each and every exercise of sovereign power within the Federal Republic, or whether the provision permits or requires some differentiation in the case of transactions that have a more or less intensive relationship to a foreign jurisdiction.⁷⁷

The application of a German constitutional provision to a transaction having foreign elements thus depends on the reasonableness of such application in the light of the provision's policy and the relationship of the transaction to Germany.⁷⁸ Once it is determined through "the ordinary processes of construction and interpretation"⁷⁹ that a constitutional provision "wants to be applied," conflicting foreign policies must yield.

⁷⁵ *Id.* at 82.

⁷⁶ [A] court should decide that the interest of the state whose creature it is shall be subordinated to that of a co-ordinate state only in rare cases and for compelling reasons

[A]n "interest" . . . is the product of (a) a governmental policy and (b) the concurrent existence of an appropriate relationship between the state having the policy and the transaction, the parties, or the litigation.

B. CURRIE, *supra* note 39, at 278, 621.

⁷⁷ 31 BVerfG at 77.

⁷⁸ Governmental-interest analysis determines the relevance of the relationship by inquiring whether it furnishes a reasonable basis for the state's assertion of an interest in applying the policy embodied in its law. Its methodology . . . is . . . the familiar one of construction and interpretation.

B. CURRIE, *supra* note 39, at 727.

⁷⁹ Currie, in W. REESE & M. ROSENBERG, *CONFLICT OF LAWS* 523 (6th ed. 1971). Currie maintained that

the process of determining the territorial scope of a statute differs from that of determining its temporal scope, or its application to marginal domestic situations only in that the interest of another state is a factor to be taken into account.

Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 762 (1963). According to the German Constitutional Court, "[t]hat task does not differ essentially from normal constitutional interpretation directed to local transactions" 31 BVerfG at 77.

It hardly seems necessary to point out additional parallels⁸⁰ to American conflicts thinking.⁸¹ Suffice it to say that whenever the constitutionality of the outcome of conflicts cases is at issue, German judges will have to engage in what looks remarkably like governmental interest analysis. Ultimately, the ordinary courts may also question the value of the rigid conflicts mechanism which forced a constitutional confrontation in *García*. Once they are ready to abandon conventional wisdom, that case suggests a possible approach.

D. *The Constitution and the Conflict of Laws*

It seems that the opinion of the German Constitutional Court is not only at odds with traditional conflicts ideas, but also contains more than just a dash of Currie. While the court's analysis may appear novel and startling to foreign observers, the result accords with the trend in other European countries to give greater sway, for teleological reasons, to the *lex fori*.⁸² Concluding a lengthy discussion of the *García* case, a French author wrote:

[O]ne cannot help but approve of the specific result reached and the general consequences of this "magisterial decision." Has not our own civil jurisprudence, in a more empirical and less dogmatic manner, more discretely and less solemnly, in effect rendered the same justice in those matters of private international

⁸⁰ Particularly striking is the following sample. The court said that [the principle of uniformity of result] is a largely unrealized ideal Certainly, the recognition of the intended marriage in the two countries of which the parties are nationals would better accord with the constitutional protection of marriages; but if this goal cannot be attained because of foreign value judgments, the complainants may not be precluded from marrying because of a principle

Id. at 83. According to Currie, the court's responsibility is the judicial one of finding a rational and just result in the case before it, not the political one of furthering some transcendent objective, whether it be the more complete effectuation of California policy in cases brought in other states, or the attainment of uniformity of result wherever the case happens to be brought.

B. CURRIE, *supra* note 39, at 596.

⁸¹ Affinities with American approaches have been noted by Jayme, *Grundrecht der Eheschliessungsfreiheit und Wiederheirat geschiedener Ausländer*, 36 RABELSZ 19, 21 n.10, 23 (1972); cf. Stöcker, *supra* note 69, at 122.

⁸² See notes 41-56 and accompanying text *supra*. In France, the precise issue resolved by the German Constitutional Court in *García* has apparently never been decided by the Cour de Cassation. However, the prevailing view seems to be to the same effect. See 2 H. BATIFFOL & P. LAGARDE, *DROIT INTERNATIONAL PRIVÉ* 80, 81 n.86 (5th ed. 1971). The case usually cited in this connection is *Sciachi*, Tribunal de la Seine, March 17, 1948, reported in 37 *REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ* 112 (1948). One month after *García* was decided the Swiss Federal Court, overruling prior case law, upheld a Danish marriage between an Italian divorced in Switzerland and a Swiss divorcée even though the Italian, according to his national law, lacked capacity to remarry. *Dal Bosco v. Bern*, 97-1 BGE 389 (1971).

law which, in Germany, are now under the fire of fundamental constitutional rights?⁸³

This reaction is somehow reminiscent of the remark by another French author that

Goethe has given Doctor Faust the devil for a friend, and with such powerful assistance Faust does what all of us did when we were twenty, he seduces a seamstress.⁸⁴

There is indeed something to be said against judicial overkill. But once the case (with nowhere else to go) reached the German Constitutional Court, the court was compelled somehow to dispose of it.⁸⁵

Be that as it may, Germany is not the first country to have experienced an interaction between constitutional and conflicts law. In the United States, the big guns of constitutional review conveniently leveled the ramparts of traditional conflicts dogma before the revolutionaries set about razing the bastion. In *Alaska Packers Association v. Industrial Accident Commission*⁸⁶ and *Pacific Employers Insurance Company v. Industrial Accident Commission*⁸⁷ the Supreme Court decided that the conventional conflicts wisdom of the times was not constitutionally mandated. State court experimentation was thus encouraged. Professor Paul Freund first suggested that the new learning found in Mr. Justice Stone's opinions is "suggestive of an approach in conflicts cases generally."⁸⁸

The approach and terminology of governmental interest analysis has been borrowed from these and other Supreme Court decisions.⁸⁹ Moreover, the revolution took hold at the state level only after the Supreme Court had already embarked on the venture of reshaping federal conflicts law.⁹⁰ Whatever adulation (or reproach) the New York Court of Appeals may deserve, it should be borne in mind that its innovations owe something to the prodding of federal courts. *Babcock v. Jackson*⁹¹ was decided after the Second Circuit had rendered an opinion that helpfully outlined

⁸³ Labrusse, *Droit constitutionnel et droit international privé en Allemagne fédérale*, 63 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 1, 46 (1974).

⁸⁴ 3 Stendhal, Letter of Jan. 20, 1838, in Correspondence, Bibliothèque de la Pléiade 255 (Gallimard 1968).

⁸⁵ See Juenger, *supra* note 64, at 297-98.

⁸⁶ 294 U.S. 532 (1935).

⁸⁷ 306 U.S. 493 (1939).

⁸⁸ *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1220 (1946).

⁸⁹ See B. CURRIE, *supra* note 39, at 613-14, 630-31.

⁹⁰ *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952).

⁹¹ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

the constitutional propriety of applying forum law to multistate situations.⁹² *Pearson v. Northeast Airlines, Inc.*⁹³ and *Richards v. United States*⁹⁴ reaffirmed the power of state courts to experiment and furnished the highest New York court with an extensive conflicts bibliography as well as a number of cogent arguments for scuttling *lex loci delicti*.

IV

SOME CONCLUDING OBSERVATIONS AND QUESTIONS

It appears that elsewhere in the world forces are at work which could ultimately bring about a reorientation of the kind that has taken place in American conflicts law.⁹⁵ As in this country, the conceptual structures of yesteryear could tumble; value and policy-oriented methodologies may take their place.

It would be tempting to conclude on the happy note that comparison has once more shown the intrinsic similarities of problem resolution that exist among various nations. More specifically, the trends emerging in Europe could support the proposition that it was worthwhile fighting the conflicts revolution, that we may be on the right track rather than in a muddle (or, perhaps, that there exists a common malaise). However, while Professor Schlesinger has long maintained that "the areas of agreement among legal systems are larger than those of disagreement,"⁹⁶ he also believes in the value of comparison as an antidote to "an unperceptive and uncritical attitude towards one's own law."⁹⁷

An eminent European conflicts teacher has accused his American counterparts of "stewing in their own juice."⁹⁸ Although this reproach may not be entirely fair, it is true that American scholarship has been overly preoccupied in recent years with problems of narrow local concern.⁹⁹ The observation of European trends suggests that there may be broader issues which deserve attention. Among the questions raised are the following:

(1) What accounts for the fact that in Europe modern trends

⁹² *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

⁹³ *Id.* at 558-63.

⁹⁴ 369 U.S. 1, 12 n.26, 13 n.27, 15 (1962).

⁹⁵ See F. JUENGER, *supra* note 29, at 5-7, 19-21, 32-35; Juenger, *Möglichkeiten einer Neuorientierung des internationalen Privatrechts*, 26 NEUE JURISTISCHE WOCHENSCHRIFT 1521 (1973).

⁹⁶ R. SCHLESINGER, *supra* note 2, at 34.

⁹⁷ *Id.*

⁹⁸ Kegel, *supra* note 29, at 41.

⁹⁹ See notes 3-6 and accompanying text *supra*.

have surfaced in the area of domestic relations rather than tort law? Is it not strange that the nationality principle is losing ground abroad while in America territorialist conceptions are breaking down?

(2) The German Constitutional Court has opted for a modern approach in the narrow context of constitutional law. Should governmental interest analysis be limited in this fashion? Is not the Constitution a primary, if not the only, repository of true governmental interests? Do guest statutes express policies of the same strength as those enshrined in the Bill of Rights?

(3) How can one explain the propensity of constitutional law to act as a catalyst for changes in the conflict of laws?

(4) Why is it that, in spite of the all-pervasive role of constitutional law, the problem of the territorial scope of constitutional provisions has not attracted much attention in the United States?¹⁰⁰

(5) Finally, how desirable and satisfactory is the modern tendency to apply forum law to international problems?¹⁰¹

Inquiries such as these offer an outlet for creative scholarship should the supply of domestic issues dwindle.¹⁰² If it is true that comparison imparts a sense of realism,¹⁰³ it could render an important service to the conflict of laws. At a time when our discipline seems to be plagued once more by an overdose of dogma,¹⁰⁴ an infusion of realism might provide the cure.

¹⁰⁰ See Juenger, *supra* note 64, at 295-96. The problem is not merely academic. The California Supreme Court, in *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973), has held the local guest statute unconstitutional. The court also ascribes to the local law theory. See *Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974); *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967). Leaving aside the question whether (as was held) guest statutes also violate the United States Constitution, does this decision mean that a California court will never apply a foreign guest act? The German Constitutional Court has not gone that far. See text accompanying notes 77-79 *supra*.

¹⁰¹ "Multistate cases, after all, present different considerations than do purely local ones." Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58, 61 (1973).

For evidence that at least this particular question can serve to stimulate fruitful inquiries see von Mehren, note 67 *supra*.

¹⁰² See text accompanying notes 3-6 *supra*.

¹⁰³ 1 K. ZWIGERT & H. KÖTZ, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* 28-29 (1971).

¹⁰⁴ Problems engendered by the new departures . . . arise not merely because any new departure of necessity creates problems, but much more because the departures have been accompanied by an unprecedented competition of ideologies, largely of academic origin . . .

Neumeier v. Kuehner, 31 N.Y.2d 121, 130, 286 N.E.2d 454, 459, 335 N.Y.S.2d 64, 71-72 (1972) (Breitel, J., concurring). See Rosenberg, *Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 551, 641, 644 (1968); Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 334 (1967).